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ALSTON & BIRD LLP			AUGHENBAUGH, WALTER	
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The time period for reply, if any, is set in the attached communication.

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANDREW W. MOEHLENBROCK, GAUTAM SHAH, and
WENDY DUNLAP

Appeal 2009-006480
Application 10/661,848
Technology Center 1700

Decided: May 26, 2010

Before CATHERINE Q. TIMM, KAREN M. HASTINGS, and
JEFFREY B. ROBERTSON, *Administrative Patent Judges*.

ROBERTSON, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the Examiner's final decision rejecting pending claims 1-6 and 8-17. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We REVERSE.

Claim 1 is illustrative:

1. An oxygen-permeable multilayer film comprising:
 - an oxygen-permeable first heat-sealable outer layer;
 - an oxygen-permeable second heat-sealable outer layer; and
 - at least one oxygen-permeable intermediate microporous layer disposed between said first and second heat-sealable outer layers,

said first and second heat-sealable outer layers independently formed from heat sealable composition comprising at least one of polyolefin, ethylene vinyl acetate, ethylene methyl acrylate, ethylene butyl acrylate, ethylene methyl acid and ionomer as a primary polymer, wherein the primary polymer is present in the heat sealable composition in an amount of at least about 20 weight percent, and said intermediate microporous layer formed from an oxygen impermeable composition and being free of particulate filler.

(Appeal Brief 12 (filed December 10, 2007) [hereinafter App. Br.].)

Appellants appeal the following rejection:

Claims 1-6 and 8-17 under 35 U.S.C. § 103(a) as unpatentable over Forte (U.S. Patent No. 6,114,024 (issued Sept. 5, 2000)) in view of Antoon, Jr. (U.S. Patent No. 4,910,032 (issued Mar. 20, 1990)). (App. Br. 4.)

ISSUE

Did the Examiner err in determining that Antoon, Jr. discloses or suggests an “intermediate microporous layer formed from an oxygen impermeable composition and being free of particulate filler”?

FACTUAL FINDINGS

1. Antoon, Jr. discloses water vapor permeable films that include “silicone[-]coated microporous films.” (Col. 3, ll. 14-17.)
2. Antoon, Jr. does not expressly state that the silicone-coated microporous films are free of filler. (Col. 3, ll. 14-17.)
3. Antoon, Jr. discloses that “[f]illers that can be used in the microporous films employed in this invention should be inorganic and inert to the polymer.” (Col. 4, ll. 18-20.)
4. Antoon, Jr. does not disclose methods of producing microporous films other than by employing fillers. (Col. 4, ll. 18-34; col. 5, ll. 5-16.)

PRINCIPLE OF LAW

In order to establish a prima facie case of obviousness, the Examiner must show that each limitation of the claim is described or suggested by the prior art or would have been obvious based on the knowledge of those of ordinary skill in the art. *See, e.g., In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988).

ANALYSIS

The Examiner found that Forte discloses the multilayer film as claimed with the exception of a microporous layer that is free of particulate filler. (Examiner's Answer 4-5 (mailed March 13, 2008) [hereinafter Ans.].) The Examiner found that "Antoon, Jr., discloses that the silicone-coated microporous film is free of particulate filler (col. 3, lines 4-17)." (Ans. 5.) The Examiner additionally stated that "the phrase 'can be used' (col. 4, line 18) is a clear suggestion (and teaching) that particulate filler is not required in the silicone-coated microporous film, and consequently, a teaching of embodiments where the microporous film does not comprise particulate filler." (Ans. 15.)

Appellants argue that Antoon, Jr. does not disclose microporous films free of particulate filler. (App. Br. 7-8.) We agree. Initially, we note that the Examiner's statement that Antoon, Jr. discloses silicone-coated microporous film free of particulate filler is not supported by Antoon, Jr. itself. Antoon, Jr. only discloses that silicone-coated microporous films may be used as the water-permeable film, and does not disclose that the films are unfilled. (FF 1 & 2.)

In addition, we cannot agree with the Examiner's statement that because Antoon, Jr. discloses inorganic fillers "can be used," particulate filler is not required in the silicone-coated microporous films. Antoon, Jr. only discloses preparing microporous films through the use of particulate fillers (FF 4), and provides no disclosure that the silicone-coated microporous films are prepared differently. Thus, because Antoon, Jr. does not disclose or suggest microporous films free of particulate filler, we are constrained to reverse the Examiner's rejection of the claims.

Appeal 2009-006480
Application 10/661,848

DECISION

We reverse the Examiner's § 103 rejection.

ORDER

REVERSED

KMF

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